

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 629 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
  5. Whether it is to be circulated to the Civil Judge? : NO

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USMANBHAI AHMEDKHA ALINAWALA

Versus

PRAMODBHAI BHAILALBHAI THAKAR  
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Appearance:

MR KV SHELAT for Petitioners

MR BG JANI for Respondent No. 1  
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CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 29/09/2000

ORAL JUDGEMENT

This Revision Application has been preferred against the judgment dated 5th May, 2000 in Civil Miscellaneous Appeal No. 330 of 1999 passed by the 2nd Joint District Judge, Kheda at Nadiad by which the order below application exh. 5 dated 21.12.1999 in Regular Civil Suit No. 337 of 1999 passed by the Civil Judge (J.D.), Mahemdabad has been confirmed, whereby the

petitioners-original defendants, their servants and agents have been restrained from interfering and disturbing the vacant and peaceful possession of the respondent-original plaintiff without due process of law and restraining them from entering the suit land till the final disposal of the suit. Being aggrieved by the said injunction order, the petitioners-original plaintiffs preferred Civil Misce. Appeal No.330 of 1999. The lower appellate court has dismissed the appeal and confirmed the order of the trial court.

2. The respondent filed Regular Civil Suit no. 337 of 1999 for a declaration and permanent injunction against the defendant alongwith the application exh. 5 for a temporary injunction. The plaintiff produced documents vide mark 3/1-2 to 3/7, 19/1 to 19/12, 37/1 to 37/4 and 25/1 to 25/2 in support of his case. One Mariyambibi was earlier married to Bhulamiya and thereafter, she married to Umravkhan and Mariyambaibi executed a will on 7.7.94 in favour of the respondent-plaintiff. She died on 16.1.95 and that will was registered on 16.7.1996. According to that will, the property of earlier husband was given to one son and two daughters from the earlier husband and in that connection, she had no concern in respect of the property. From the latter husband, she had no issue. On the death of Umravkhan, she had received the property of Umravkhan by way of inheritance. There was no encumbrance or heir or co-sharer of that property. The entire property of her husband was in her exclusive possession as owner. She was staying with the plaintiff Pramodbhai since long and she was being maintained by the plaintiff Pramodbhai. He also used to help her in her treatment and in good and bad causes. Thus, there was no other support to her. Hence, she executed the said Will in favour of the plaintiff Pramodbhai.

3. A Court Commissioner was appointed and he submitted his report dated 18.11.99 wherein it has been mentioned that there was a gate which was locked and the key of the said lock was taken from the defendants and at that time, the plaintiff was not having that key. Another lock was also opened with the key which was with the defendants and the plaintiff had also no key of that lock. In the room, some vessels were found having name of the petitioner Usmanbhai Ahmedkha Alinawala and there is second room which was also opened by the key which was with the defendants and the plaintiff had also no key of that lock. There was a compound of about 2 vighas which was being used. The trial court after going through the material on record, came to the conclusion that there is

a prima facie case in favour of the plaintiff and balance of convenience is also in favour of the plaintiff. It was also found that if the defendants misuse the electricity in the premises taken by the plaintiff, he will suffer an irreparable loss and as the plaintiff has obtained electric connection at huge expenses and constructed a house therein and prima facie he appears to be the owner and in possession of the suit land. If the injunction is refused, he will not be in a position to enjoy the rights over the suit land and he will suffer an irreparable loss which cannot be compensated in terms of money and the injunction application was allowed.

4. Being aggrieved by the said order of the trial court, the petitioners-original defendants filed Civil Miscellaneous Appeal No. 330 of 1999 before District Court. The lower appellate court, after considering the material on record and submissions of the learned advocates for the parties, dismissed the appeal and confirmed the order of the trial court vide its order dated 5th May, 2000. Therefore, the petitioners-original defendants have preferred this Civil Revision Application before this Court.

5. The contention of the learned counsel for the petitioners is that the lower appellate court has ignored to consider the material evidence on record, that is, the Court Commissioner's report which shows the possession of the petitioners-defendants. The courts below have also not considered the ration card of Mariambibi which was produced by the defendants to show that the petitioners were also residing with her and the electoral card (identity card) of the petitioners. As such, the courts below have committed an error in not considering the relevant documents on record which amounts to jurisdictional error. In support of his arguments, the learned counsel for the petitioners has also placed reliance on the decision of the Apex Court in the case of Mahavir Prasad Jain vs. Ganga Singh reported in 1999 (8) SCC, 274 wherein it has been held that where trial court commits grievous errors such as making of erroneous presumptions and non-consideration of evidence on record, the High Court fails in its duty, if it ignores such errors. The learned counsel for the petitioners also pointed certain portion from the judgment of the trial court to show that the trial court has made erroneous presumptions in arriving at the findings. In this respect, he also relied on the aforesaid authority wherein it has been observed as under:

"Apart from the fact that the Sub-Judge has taken

a prima facie view of the matter, it is seen that he has proceeded on an erroneous assumption of the position in law. Exclusive possession by itself will not give rise to any presumption of tenancy and the Sub-Judge is entirely wrong in expressing the opinion in that order. Consequently, the trial court in the present proceeding is in error in placing any reliance on the said order of the Sub-Judge."

6. The next contention of the learned counsel for the petitioners is that no mandatory relief has ever been granted for possession subsequent to the Commissioner's report. Under the guise of prohibitory orders, mandatory order has been passed by the trial court and the possession of the defendants will be snatched away. The learned counsel for the petitioners also emphatically argued that the claim of the plaintiff is based on Mariyambibi's will, whereas Mariyambibi has no right to executed the will in respect of the property for more than 1/3rd share. Mohmedan law does not permit the same. He also relied on the principles of Mahomedan Law by Mulla. Clause-18 says about limit of testamentary power. A mohmedan cannot, by a will, dispose of more than 1/3rd of surplus of his estate. According to him, the deceased Mariyambibi had inherited the entire property of Umravkhan and she was the full owner of that property and she was also in possession. It is not disputed that there were three heirs, i.e. two daughters and one son from the earlier husband Bhulakhan and they will be deemed to be the legal heirs of Mariyambibi and they have not consented at any stage to give the property pursuant to the will executed by their mother in favour of the plaintiff-respondent. At the most, she was entitled to transfer the property by the will only for 1/3rd of the estate. As such, the transfer by way of a will to the plaintiff for more than 1/3rd share is illegal and the petitioners being the legal heirs of Mariyambibi are entitled for the same. They have also filed Civil suit no. 196 of 1999 for a declaration that the Will is fictitious and sham and that suit is still pending. The legal status has to be considered either by the trial court or by the lower appellate court. The trial court has drawn several erroneous presumptions that the defendants have not established that they are the owners and the will has not been challenged by the defendants.

7. I have considered the contentions of the learned counsel for the petitioners and the learned advocate for the respondents and perused the evidence on record. The trial court has considered the Will wherein

it has been mentioned that from the first marriage, there are two daughters and one son. The trial court has come to the conclusion that looking to the will, Mariyambibi has entrusted the property to the plaintiff and that will has been subsequently registered on 16.7.96. The rights of record have also been produced and the name of the plaintiff was mutated on 20.7.96. In the village form no. 7/12 the name of the plaintiff has been recorded. The receipts of the plaintiff of the revenue taxes for different years have also been produced at mark 3/4. It has also been observed that had these heirs of the deceased Mariyambibi been residing with her, their names must have been continued in the revenue record, but their names have not been continued after the death of Mariyambibi. As such, it appears that they were not residing with her. The petitioners have not produced any evidence to show that they were living with Mariyambibi at the time of her death. The trial court has also considered the legal status of the lady whether she was entitled to execute a will for 1/3rd part of her property and the heirs have not raised any objection or resisted or challenged the same as being false. But this finding appears to be erroneous for the fact that they have challenged the will by filing a separate suit which is still pending and they have alleged in the written statement that the will is fictitious and sham one as contended by the learned advocate for the respondents. The trial court has also relied on the vital evidence, that is, the plaintiff applied for an electric connection from Gujarat Electricity Board and the consent letter was produced before the Board and their statement was also recorded. The respondent-plaintiff also filed a receipt for payment of Rs.11,100/- as charges for obtaining electric connection. Additional charges of Rs. 3715/were also paid and relevant documentary evidence has been produced in that connection before the court concerned. The defendants also stated in their reply and affidavit that the plaintiff has obtained electric connection at his own costs and expenses. The trial court came to the conclusion that no person would allow other person to take electric connection in the property of his possession. When the plaintiff has obtained electric connection in the suit property at his own costs, there was a prima facie case to plead that the plaintiff was in possession of the suit property. The trial court also found prima facie case on the basis of the revenue record filed by the plaintiff and holding that the plaintiff was the owner and in possession of the suit property. The trial court has considered the Commissioner's report and map. He ignored the possession of the petitioners-defendants on the basis of the

Commissioner's report as the defendants came to know about filing of the suit, illegally entered into the suit premises and had put a lock thereon. A police complaint in that respect has also been lodged. Though the summons had not been served to the defendants at the relevant time, he was found present at the time of the panchnama, but on the earlier night, he was in police custody and the trial court accepted the contentions of the plaintiff that the defendant had put his locks afterwards. The trial court has also considered the bill of purchase of material for construction of the house and levelling of the land. The affidavits of adjoining owners have also been filed by the respondent-plaintiff to show that the plaintiff was using and cultivating the suit land and pakka house was also constructed thereon. The plaintiff has obtained the electric connection and they have not seen the defendants cultivating or visiting the suit land. One of the deponents of the affidavits has stated that the plaintiff was using water of his well to cultivate the suit land. The defendants have not filed affidavits of any of the adjoining owners or passersby of the suit land.

8. Thus, the trial court came to the conclusion that there was a prima facie case and balance of convenience in favour of the plaintiff and irreparable loss would be caused to the plaintiff if the injunction is not granted. The lower appellate court has confirmed the findings of the trial court. It is true that the appellate court has not mentioned the court commissioner's report and map submitted by the defendants, but the evidence has been considered and appreciated by the lower appellate court.

9. So far as the argument of the learned advocate for the petitioners that the petitioners are the heirs and legal representatives of the deceased Mariyambibi is concerned, it is disputed whether they are legal heirs of that lady. No doubt, from the Mulla's Mohmedan law, it appears that no Muslim can dispose of his property exceeding his 1/3rd share. But in the present case, the petitioners are the sons from the earlier husband Bhulakhan and that is a legal and disputed question whether they would be deemed to be legal heirs of Mariyambibi and that is to be decided by the trial court at the relevant time. From the evidence on record, it appears that they have consented to obtaining electric connection when applied by the plaintiff and he deposited a huge amount for obtaining the electric connection and constructing room therein. The petitioners have consented in installing the electric

connection.

10. The learned advocate for the respondent contended that the petitioners have consented regarding this in respect of the property. There is an express as well as implicit consent to that effect, express, in the sense that they have given their consent. In case they have not consented as they have not raised any objection as to why the plaintiff has obtained the electric connection in the property for which he has no concern. On that basis, the trial court appears to be justified in coming to the conclusion that the petitioners have consented in installing the electric connection. It is also pointed out by the learned advocate for the respondent that the name of Mariyambibi continued from 1985-1986 till her death i.e. 16.1.95. The suit has been filed by the respondent on 18.12.99 after five years and it can be inferred that there was also an implied consent regarding property to the plaintiff.

11. From the findings of the courts below, it does not appear that they have committed any jurisdictional error in arriving at a conclusion that the plaintiff was in possession of the suit property and in issuing interim injunction. The impugned orders also do not suffer from any jurisdictional error, illegality or material irregularity calling for interference with the concurrent findings recorded by the courts below. This Revision Application therefore, deserves to be dismissed and is accordingly dismissed. Rule is discharged. Interim relief is vacated.

12. In the last, the learned advocate for the petitioners requested to continue the interim relief for a further period of four weeks. I do not find any substance in this request. Accordingly, this request is rejected.

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